

Appeal from a decision of the Area Manager, Clackamas Area, Oregon, Bureau of Land Management, rejecting application for communications site right! of-way. OR! 47088.

Affirmed.

1. Communication Sites! -Federal Land Policy and Management Act of 1976:  
Rights! of-Way! -Rights! of-Way: Applications

An application for communications site right! of-way is properly rejected as not in the public interest where BLM determines that an existing Federal right! of-way provides adequate capacity for the applicant's radio transmitting and receiving equipment, and that granting the application would result in unnecessary proliferation of communications equipment and resulting adverse impact on visual resources. BLM is not required to issue another right! of-way to foster economic competition or to permit the applicant to avoid rents charged by the current right! of-way holder.

APPEARANCES: Erica L. Rigik, SMR Network, Inc., Portland, Oregon, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

SMR Network, Inc. (SMR), has appealed from the May 15, 1991, decision of the Area Manager, Clackamas Area, Oregon, Bureau of Land Management (BLM), rejecting its application for a communications site right! of-way (OR! 47088) on Goat Mountain (East) in northwestern Oregon. 1/

On April 16, 1991, SMR applied for a 10! year, renewable communications site right! of-way on the site in Clackamas County, Oregon, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (1988). SMR sought to construct an 80! foot tower for radio transmitting and receiving equipment, a small building, and an underground powerline on Goat Mountain (East).

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1/ SMR's name has, since the filing of its appeal, been changed to Northwest Antenna Site Services, Inc.

Goat Mountain (East) is one of two proximate mountain peaks on the western flanks of the northern Cascade Mountains. The other peak is Goat Mountain (West), which is one-quarter mile to the west. The peaks have a maximum elevation of about 4,200 feet. Goat Mountain (East) is public land and Goat Mountain (West) is private land; both peaks are the site of communications facilities. Goat Mountain (East) provides coverage of the northern Willamette Valley from Salem, Oregon, to Longview, Washington.

At the time of SMR's application, Goat Mountain (East) was already subject to a Federal right-of-way (OR! 34944) issued to Cascade Utilities, Inc. (Cascade), on October 22, 1984. On February 26, 1990, BLM issued the "Goat Mountain (East) Communications Site Management Plan" (Plan). The Plan was designed to assess alternatives for the development and management of the mountaintop for communications site purposes. Two of the prime objectives of the Plan were to allow for future expansion in order to meet anticipated increased public demand for communications facilities, and, at the same time, to "[m]aximize land use \* \* \* in order to reduce the overall physical development of the site" (Plan at 2). BLM considered three alternatives: (1) No action; (2) allowing construction on an "applied-for" basis; and (3) amending Cascade's right! of-way grant to permit sub-granting and allowing new facilities once the existing facility reaches capacity (see Plan at 3).

Alternative No. 2 apparently involved granting other rights! of-way (in addition to right! of-way OR! 34944) to permit construction of more communications facilities (see "Interview Sheet," July 18, 1989). BLM noted that this alternative could result "in a proliferation of buildings and towers," thus adding to the adverse visual impact on the northern Willamette Valley (Plan at 4). By contrast, alternative No. 3, which BLM selected, authorized the placement of communications equipment by existing and future third-party users in Cascade's existing facilities, without the necessity of granting additional rights! of-way (see "Interview Sheet," dated July 18, 1989; and "Invitation to Participate in the Development of a Communications Site Management Plan for Goat Mountain," dated July 28, 1989). However, the alternative also provided that additional facilities could be authorized "[w]hen the existing multiple-user building reaches capacity" (Plan at 5). <sup>2/</sup> Thus, BLM opted to provide for the "minimization of the number of buildings, antennae, and towers \* \* \* to the extent possible." Id. BLM thereafter granted Cascade the right to sub-grant the site to other communications site users. SMR is one of the sub-grantees.

At the time of the May 1991 BLM decision, one 150! foot tower and two associated buildings had been constructed by Cascade within an 80! by

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<sup>2/</sup> Although BLM had not yet authorized Cascade to construct a second building in conjunction with its right! of-way grant in February 1990, that was already contemplated (see Decision, dated Feb. 26, 1990).

80! foot fenced area. <sup>3/</sup> According to its application, SMR decided not to continue to lease space from Cascade due to the cost: \$21,000 per year plus a combining fee of \$2,000 per transmitter (see also "Interview Sheet" dated Mar. 26, 1991).

The Area Manager rejected SMR's communications site right! of-way application in the May 1991 decision, ruling that it did not conform to the Plan, and that BLM had not been persuaded that departing from the Plan was in the public interest. She noted that the Plan recognized that the existing facility was expected to reach capacity in the future, and that an additional facility would have to be constructed to accommodate anticipated growth in the radio communications industry, but that that had not yet occurred. Therefore, she concluded that authorizing another right! of-way would result in an "untimely proliferation of communications facilities," which could not be permitted.

SMR contends that BLM improperly refused to grant it a right! of-way for the construction of additional communications facilities on Goat Mountain (East), asserting that the effect is to stifle economic competition in providing those facilities to communication site users, thus allowing the existing right! of-way holder to charge unreasonably high rental rates. Appellant terms the current situation "monopolistic" and asserts that the rates charged are prohibitive to many communication site users, thus limiting access to the existing facilities (Statement of Reasons (SOR) at 2). It contends that the situation has also resulted in the proliferation of towers on nearby private land, thus impairing the aesthetic character of the overall mountaintop.

[1] Since approval or rejection of a right! of-way application is committed to BLM's discretion by section 501(a) of FLPMA, as amended, 43 U.S.C. § 1761(a) (1988), it is well established that a decision rejecting an application will be affirmed where the record demonstrates that it was made after a reasoned analysis of all relevant factors, with due regard for the public interest. See 43 CFR 2802.4(a); Glenwood Mobile Radio Co., 106 IBLA 39, 41-42 (1988).

BLM concluded that the public interest did not favor a departure from the Plan, as the result would be an unnecessary proliferation of communications facilities on top of Goat Mountain (East), and as the existing authorized site was adequate to accommodate appellant's communications equipment. Issuing a right! of-way grant to appellant would result in at least one more tower and building on the mountaintop. <sup>4/</sup> BLM concluded that these facilities would adversely impact visual resources. That impact was avoidable since it is undisputed that

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<sup>3/</sup> There is also a tower constructed at that location in connection with a communications site right! of-way reservation, OR! 38793, issued to the U.S. Forest Service on Aug. 8, 1985.

<sup>4/</sup> Appellant argues that continuing to restrict communications site use on Goat Mountain (East) to Cascade's existing right! of-way will itself result

appellant's equipment could be accommodated by Cascade's existing facilities.

Avoiding the unnecessary proliferation of rights! of-way and associated structures on public land, especially where to do so minimizes environmental damage, is undoubtedly in the public interest. Section 503 of FLPMA expressly provides: "In order to minimize adverse environmental impacts and the proliferation of separate rights! of-way, the utilization of rights! of-way in common shall be required to the extent practical." 43 U.S.C. § 1763 (1988); see also 43 CFR 2800.0! 2; Ben J. Trexel, 113 IBLA 250, 253 (1990); Glenwood Mobile Radio Co., supra at 42; Arnold E. Hedell, 37 IBLA 22, 24 (1978); Jicarilla Apache Indian Tribe, 29 IBLA 57, 60, 64-65 (1977). BLM's decision to reject the application is properly affirmed because the unnecessary proliferation promised by the application was not in the public interest. See 43 CFR 2802.4(a)(2). BLM considered all relevant factors in deciding to reject appellant's application, and its decision reflects a proper exercise of its discretionary authority. See Glenwood Mobile Radio Co., supra at 42; Jicarilla Apache Indian Tribe, supra at 64-65.

Appellant contends that BLM should provide it the opportunity to compete with Cascade and other existing right! of-way holders on private and public land on Goat Mountain (East) and Goat Mountain (West) by affording communications facilities at a lower rate to communications site users, thus benefiting those users, i.e., operators of land/mobile radio systems, and ultimately the public (see SOR at 2).

In general, BLM's responsibilities concerning the issuance of right! of-way grants under section 501(a) of FLPMA extend only to determining the proper use of the public lands. See 43 U.S.C. § 1761(b)(1) (1988); 43 CFR 2800.0! 2. In making that determination, BLM is guided by whether or not issuance of a right-of-way is in the public interest. 43 CFR 2800.0-7(a). Although under section 501(b)(1) of FLPMA, as amended, 43 U.S.C. § 1761(b)(1)(1988), the Secretary "shall require \* \* \* that the applicant submit and disclose \* \* \* information reasonably related

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fn. 4 (continued)

in a proliferation of communications facilities, due to the high rental rates charged by Cascade. In support of this assertion, appellant points only to the fact that the Oregon State Police relocated on private land (presumably on Goat Mountain (West)), in order to avoid Cascade's high rent (see SOR at 2). However, there is no evidence that a general proliferation of facilities would occur such that BLM was required to consider it. See John D. Archer, 120 IBLA 290, 300 (1991), appeal filed, Archer v. Lujan, No. 91-0472-E EJL (D. Idaho Nov. 6, 1991). To the contrary, in February 1990, 11 third parties were using or authorized to use the facilities on Goat Mountain (East) (see Plan at A! 1 to A! 2). So far as we know, at most only two (possibly the Oregon State Police and appellant) have relocated to Goat Mountain (West).

to the use, or intended use, of the right-of-way, including its effect on competition," that requirement comes into existence only when the Secretary "deems [it] necessary to a determination" whether a right-of-way should be granted. <sup>5/</sup> Thus, in making a public interest determination regarding right-of-way issuance, BLM may require that the applicant supply information about its effect on competition. In this case, BLM found no necessity to do so. As we have stated, granting the right-of-way clearly was not in the public interest.

BLM's decision is not rendered improper simply because appellant may find it necessary to use Cascade's facilities. In a May 8, 1991, letter to BLM commenting on SMR's right-of-way application, Cascade stated that SMR was "required to pay the same rate as all others utilizing identical service from the Goat Mountain facility. This does not place them at an unfair competitive disadvantage, but in fact places them on an equal footing with others in the business of providing two-way mobile communication services to the public."

Appellant asserts that Cascade is charging excessive rental for that use. Departmental regulations expressly permit a right-of-way holder, with BLM's approval, to authorize use of a facility constructed on its right-of-way and to "charge for such use." 43 CFR 2801.1-1(f). We are unpersuaded, based on the present record, that the charges imposed by Cascade are excessive. <sup>6/</sup> BLM's decision to authorize Cascade to sublease its facilities is amply justified by its policy of avoiding proliferation of facilities on the site.

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<sup>5/</sup> In John D. Archer, supra at 298-99, the Board reviewed a decision by BLM to issue a phosphate slurry pipeline right-of-way under section 501 of FLPMA to J. R. Simplot Company. Archer argued, inter alia, that BLM should consider the economic impact on other producers of phosphate ore, in terms of increased ore shipping costs, of not requiring, as a condition of the grant, that the pipeline be operated as a common carrier. In affirming BLM, we assumed "for the purposes of this decision that BLM properly considers the purely economic impact of a proposed action." Id. at 298-99 n.13. We noted that there was a question whether the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C) (1988), required such consideration, and we expressly declined to rule on whether section 501(b)(1) of FLPMA did.

<sup>6/</sup> Of course, we would expect BLM to take into account the rental payments received for use of the site, to the extent that they reflect use of the site rather than use of any improvements constructed by Cascade, in establishing the fair market value of the site and, accordingly, the rental it charges Cascade.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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David L. Hughes  
Administrative Judge

I concur.

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Bruce R. Harris  
Deputy Chief Administrative Judge

131 IBLA 389